Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN PATRICK ROGALA, Petitioner,

V.

UNITED STATES OF-AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a certificate of appealability should have been issued because it can be reasonably debated whether *Booker* sets forth a logical continuation of the rights for defendants who were sentenced after *Apprendi*, and therefore should be applied retroactively, as it is not a new procedural rule?

II. Whether a certificate of appealability should have been issued because it can be reasonably debated that the right of confrontation as defined by *Crawford* should be applied retroactively?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below were Petitioner John Patrick Rogala and the United States of America. The United States is the Respondent before this Court.

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II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the determination of whether it is reasonably debatable that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of appealability should issue for the case to be decided on its merits.

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OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit styled *United States v. John Patrick Rogala,* No. 05-50689, issued on October 24, 2006, is attached hereto as Appendix A.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The Court of Appeals affirmed in an order entered October 24, 2006. There was no petition for rehearing. This petition follows within 90 days of the judgment of the Court of Appeals.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Rogala pled guilty in Cause # W-90-CR-121(4) pursuant to a plea agreement to a violation of 21 U.S.C. §841 (a)(1) and 18 U.S.C. § 1956 (A)(1)(a)(i). Rogala was sentenced to 240 months imprisonment on one count, and 60 months imprisonment on the second count, to be served concurrently. Rogala objected to a "role of the offense" enhancement during sentencing. Rogala filed a notice of appeal to the Fifth Circuit on November 8, 1991. Rogala filed his appeal to the Fifth Circuit in Cause #91-8624. In his appeal, Rogala raised the issues that would later be decided in *Booker* and *Crawford*. Rogala objected to the use of offenses and evidence that were neither pled to nor proven before a jury in his sentencing. Rogala also objected to the lack of confrontation of witnessess during sentencing. The sentence was affirmed by the Fifth Circuit Court of Appeals in an opinion issued as mandate on October 13, 1992.

Rogala subsequently filed a motion to correct sentence pursuant to 28 U.S.C. § 2255 on April 19, 2005.

The district court denied the motion, and construed the motion as a request for a certificate of appealability, and also denied that request. Rogala appealed the denial of the certificate of appealability to the Fifth Circuit, in Cause #05-50689, and that appeal was denied on October 24, 2006.

REASONS FOR GRATING THE WRIT

I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this court; namely the determination of whether it is reasonably debatable that the decision in *United States v. Booker* is a logical continuation of the rights granted in *Apprendi*, and that a certificate of appealability should issue for the case to be decided on its merits.

The Fifth Amendment provides in part that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Likewise, the Sixth Amendment provides in part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI. Recent jurisprudence in this court have provided more clarifications of these constitutional rights.

This court decided in *Apprendi v. United States*, 530 U.S. 466 (2000), that a jury, and not a judge, must provide the assessment of facts that increased the prescribed range of punishment for an offense. The decision in *Apprendi* was further clarified by the decisions in 2004 of *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).

Essentially, in *Blakely* and *Booker*, the Supreme Court delivered a knockout blow to binding sentencing guidelines. However, there remains the unresolved question of whether the thousands of federal prisoners sentenced before *Blakely* and *Booker* are entitled to any relief. Since most of their convictions are "final" (that is, the deadlines for filing appeals or petitions for certiorari have expired), these prisoners must resort to the federal habeas statute at 28 U.S.C. 2255 to attack their sentences under *Blakely* or *Booker*. This is the exact position that Cole finds himself in,

and that the lower courts have denied a certificate of appealability to determine.

This court has the authority to review a denial of certificate of appealability, as established in *Hohn v. United States*, 524 U.S. 236 (1998). *Hohn* considered a case where this court had, following a direct review of the petitioner's case, altered the definition of the statute under which he was convicted. This court found that this change was a constitutional one, and remanded the case to the lower court to reconsider the case. Importantly, *Hohn* established that this court has the jurisdiction to reconsider a lower court's denial of a certificate of appealability.

To be eligible for a certificate of appealability, a petitioner must demonstrate that the point of appeal is at least reasonably debatable, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the Fifth Circuit has decided the issue of the retroactive applicability of *Booker* in *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005), Rogala believes that this case is wrongly decided, and desires an opportunity to argue that point.

In brief, the argument that Rogala would present, given the opportunity is as follows. Before the decisions in *Blakely* and *Booker*, the federal guidelines required federal judges to lengthen many sentences for conduct neither found by a jury nor proved beyond a reasonable doubt. Through the collateral vehicle provided by a 2255 motion, federal prisoners could attack these types of sentences on two distinct constitutional theories: (1) the sentence violated the Sixth Amendment because a jury did not find facts legally essential to the punishment; and (2) the sentence violated the Due Process Clause of the Fifth Amendment because those same facts were not proved beyond a reasonable doubt. Collateral challengers may not, however, claim relief under a newly announced Court decision absent a threshold determination by a federal court that the decision applies retroactively to cases on collateral review. As such, the possibility remains that these prisoners will lack a forum in which to remedy any *Blakely-Booker* constitutional

violations. This court has already declared nonretroactive the jury-trial prong of *Apprendi* (and a fortiori *Blakely* and *Booker*) in *Schriro v. Summerlin*, 542 U.S. 348 (2004).

The only potential challenge that remains is the Fifth Amendment due process violation as the only *Blakely-Booker* claim still cognizable in a 2255 motion. In the absence of a Supreme Court ruling to the contrary, lower courts are free to decide whether the *Blakely-Booker* due process requirement applies retroactively, as determined in *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). The Fifth Circuit has decided against the retroactive application of *Booker*, as have all other circuits to date. However, as this issue has not been decided by this court as of yet, it remains a reasonably debatable question, and therefore should be granted a certificate of appealability.

II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the determination of whether it is reasonably debatable that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of appealability should issue for the case to be decided on its merits.

The Sixth Amendment provides, in part, that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), this court declared that an accused has the right to cross-examine any testimonial witnesses to be used against him or her, regardless of prior exceptions in the Rules of Evidence. At least one circuit, the Ninth, has declared that the rights in *Crawford* apply retroactively, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005).

In Rogala's sentencing, a single witness was present, and while there was an opportunity to confront that witness,

the witness also introduced a number of hearsay statements into evidence. The makers of those statements were not present, so Rogala was not afforded his right to confront the witnesses providing that testimony.

As the question of both the retroactivity of *Crawford* and its application at sentencing have not yet been decided by this court, it is a reasonably debatable question that should be decided on its merits, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the lower courts declined to approve a certificate of appealability, this court has the jurisdiction to do so, as was decided in *Hohn*. Therefore, a certificate of appealability should be granted to decide this question.

CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted, and the case considered on its merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50689
USDC No. 6:05-CV-155
USDC No. 6:90-CR-121-4

UNITED STATES OF AMERICA, Plaintiff-Appellee,

Vs.

JOHN PATRICK ROGALA, Defendant-Appellant

October 24, 2006, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas

ORDER: John Patrick Rogala, federal prisoner #20493-077, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. 2255 motion, which challenged his sentences for aiding and abetting money laundering. Rogala seeks relief on the basis of *United States v. Booker*, 543 U.S. 220 (2005), and *Crawford v. Washington*, 541 U.S. 36(2004). Rogala has not shown that reasonable jurists would find the district court's determinations debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, COA is DENIED.

E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-05-CV-155
Criminal No. W-90-CR-121(4)

JOHN PATRICK ROGALA, Movant

Vs.

UNITED STATES OF AMERICA, Respondent

April 22, 2005, Filed

ORDER: Came on for consideration the Movant's Motion to Correct Sentence Pursuant to 28 U.S.C. 2255.

The Court, having considered said motion, finds that it should be denied as time-barred. Additionally, the Court, finds that the motion lacks merit and should be denied as *Blakely* and *Booker* are not retroactive. *United States v. Booker*, 543 U.S. _____, No. 04-104 (Jan. 12, 2005). Accordingly, it is

ORDERED that Movant Motion Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED**.

SIGNED this 22nd day of April, 2005.

WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE